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CHARLES ELMORE

No. [redacted]. 62 October Term, 1928.

IN THE

Supreme Court of the United States

JOHN BAIZLEY IRON WORKS and THE OCEAN ACCIDENT & GUARANTEE CORPORATION, Limited,

Appellants,

v.

ABRAHAM SPAN,

Appellee.

On Appeal from the Supreme Court of the Commonwealth of Pennsylvania.

Appellee's Reply to Statement as to Jurisdiction on Appeal.

WILLIAM J. CONLEN,
Counsel for Appellee.

International, 236 Chestnut St., Philadelphia

IN THE

Supreme Court of the United States.

October Term, 1928. No. 810.

JOHN BAIZLEY IRON WORKS AND THE OCEAN ACCIDENT & GUARANTEE CORPORATION, LIMITED,

Appellants,

v.

ABRAHAM SPAN,

Appellee.

APPELLEE'S REPLY TO STATEMENT AS TO JURISDICTION ON APPEAL.

The appellee in reply to appellants' statement of the jurisdiction of this Court, respectfully represents that an examination of the Record discloses no question of a Federal nature involved so as to give this Honorable Court jurisdiction of this cause:

The appellee, injured in the course of his employment by John Baizley Iron Works, sought an award under the Pennsylvania Workmen's Compensation Act (Act of June 2, 1915, P. L. 736, as amended) and an award of compensation in appellee's favor was made by the Referee. (R., 17, 18.) [1]

The award of the Referee was sustained on various appeals by the Workmen's Compensation Board (R., 23),

[1] As in appellants' statement as to jurisdiction on appeal, all references to the record are to the certified unprinted record on file with the Clerk of this Court.

the Court of Common Pleas No. 4 of Philadelphia County (R., 29), the Superior Court of Pennsylvania (R., 32), and the Supreme Court of Pennsylvania (R., 55).

Reasons for contention of lack of jurisdiction:

I. Record Does Not Disclose Federal Question;

II. Jurisdiction of State Court May be Affirmed on Non-Federal Grounds;

III. Recent Prior Decisions of this Court Govern This Case in Favor of Appellee:

I. The only reference to a Federal question before the Referee, was by a representative of the insurance carrier, made while appellee was under cross-examination—"Mr. Referee, I question the authority of this court on this case, coming under the Maritime Act, he was working on shipboard and the ship was commissioned in Commerce, being repaired." (R., 14.)

The record indicates only that at the time of the injury the appellee was employed by the John Baizley Iron Works, as a blacksmith helper (R., 7, 15); the record does not disclose that John Baizley Iron Works was engaged in repairing the steamship "Bald Hill," or that it ever before had, or would ever again have employees employed on navigable waterways. The record only shows that the John Baizley Iron Works was an *iron works* (R., 7); that appellee was injured on board a ship which was being repaired (R., 14); and that appellee at the time of injury was painting angle irons (R., 9, 10, 15).

Nowhere in the record does it appear that appellee was employed to work as a marine repairman, that he regularly so spent even a portion of his time, that he had ever before or would ever again be employed in such an occupation, or intended to be employed in any work of a maritime character or on navigable waters.

The record shows that appellee was not a regularly employed worker on navigable waters—

"Q. What particular work were you doing on that day?

"A. I was painting the iron in the engine room.

"Q. Tell the Referee what happened to you on January 13th.

"A. We came in the morning to work.

"Q. Just before this accident occurred to you, what were you doing?

"A. We worked in the boiler shop.

"Q. On this particular day you were working on this ship?

"A. Yes." (R., 9.)

There is nothing in the record to indicate that the vessel on which the injury occurred was an instrument of commerce. In fact, the Referee found that the ship was "Out of commerce." (R., 16.) There is no testimony that it was ever so engaged except the inferences to be drawn by the statement of the Referee and the stipulated statement of facts on appeal to the Supreme Court of Pennsylvania, that it had steamed into Philadelphia, and was undergoing repairs. (R., 16, 34.)

Upon such a record, appellants contend that a Federal question is involved, because the validity of the application of the Workmen's Compensation Act has been called in question under the Constitution of the United States.

The situation presented is that of an employee, not regularly employed on a navigable waterway in work of a maritime character, who is not shown to have been engaged at the time of accident in work of a maritime character for his employer, whose employer is not shown to be under any contract to repair the vessel on which the injury occurred or perform any work of a maritime character, and one where the appellant is not the employer but an insurance carrier directly liable to the appellee under the terms of a State statute.

II. The action of the State Court may be affirmed on non-Federal grounds, and, therefore, its judgment should be affirmed.

Appellants and appellee both accepted the provisions of the Pennsylvania Compensation Act and intended to be thereby bound This appears from the findings of the Referee (R., 15, 17) and the opinion of the Superior Court (R., 31). The Referee concluded that both parties were bound by the Act in accordance with the contract made between them, and made an award against the insurer, Ocean Accident & Guarantee Corporation, Ltd., but made no award against the employer, John Baizley Iron Works (R., 17, 18). See also opinion of Superior Court (R., 31). Therefore, the question of the liability of the appellant, John Baizley Iron Works, is moot and its appeal should be dismissed.

The appellant, Ocean Accident & Guarantee Corporation, Ltd., was found by the Referee to have contracted with the provisions of the Voluntary State Compensation Act in view (Opinion of Superior Court, R., 31). Having so contracted it is estopped to deny the constitutionality of the act.

Under the Pennsylvania Workmen's Compensation Act, which is an elective act similar to the Oregon Statute before this court in Grant Smith-Porter Co. v. Rohde (257 U. S., 469 (1921)), an insurance carrier is directly liable to the insured employee (Act of June 2, 1915 P. L. 769, Sec. 1, as supplemented by Act of June 26, 1919 P. L. 642, Sec. 401, Art. IV, P. L. 659, Opinion of Superior Court), (R., 31, 32). The insurance carrier may not lawfully agree to render compensation in case of injury, accept a premium or premiums therefor, and not be estopped to set up as a defense to an award against it that the Act under which they had agreed to act is unconstitutional. The question once decided by the local Court does not essentially involve a constitutional question. It was purely a local question.

III. Recent prior decisions of this Court squarely govern this case in favor of appellee:

Grant Smith-Porter Co. v. Rohde (supra);
Miller's Indemnity Underwriters v. Braud, 270 U. S. 59 (1926);
Alaska Packers' Assn. v. Industrial, etc. Commission, 276 U. S. 467 (1928).

It is, therefore, respectfully submitted, that this appeal be dismissed for lack of jurisdiction.

Respectfully submitted,

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